

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2024/0006

BETWEEN:

GEORGE KIRNON

Appellant

and

[1] ATTORNEY GENERAL

[2] SUPERVISOR OF ELECTIONS

Respondents

Before:

The Hon. Mr. Trevor M. Ward
The Hon. Mr. Eddy D. Ventose
The Hon. Mr. Gerard St. C Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

The Appellant in person
Ms. Renee Morgan for the Respondents

2024: October 21.

Civil appeal - Judicial Review Proceedings – Section 22 of the Elections Act – Section 51 of the Constitution of Montserrat - Whether the Returning Officer exceeded her jurisdiction in purporting to invalidate the appellant's nomination paper on the basis that he had not satisfied the requirements of section 51(3)(c) of the Constitution

A general election was scheduled to be held in Montserrat on 24th October 2024. 10th October 2024 was appointed Nomination Day. The appellant duly submitted his nomination papers to the Returning Officer. No objection was made by anyone to his nomination papers and no indication was given to him on that day as to the status of his nomination papers, whether valid or invalid. It was previously agreed between the Electoral Commission and prospective candidates that if objections were taken to any prospective candidate's nomination paper, that candidate would be allowed 48 hours to respond. On 13th October 2024, the appellant received a letter from the Returning Officer, dated 11th October 2024, informing him that his nomination was being rejected because he did not meet the requirements of section 51(3)(c) of the **Constitution**.

On 14th October 2024, the appellant launched judicial review proceedings. The essential ground of the judicial review application was that the decision of the Returning Officer was

arrived at in breach of the rules of natural justice insofar as she did not provide the appellant with the opportunity to be heard and in a manner inconsistent with the procedure established by the Elections Commission and/or the Supervisor of Elections whereby candidates were assured that in the event of any objection to their nomination, the candidate would be given 48 hours within which to respond before a decision is made.

In a judgment dated 15th October 2024 the learned high court judge dismissed the application. He held that the appellant was asking the court to mandate the Returning Officer to register him as a candidate for the elections and to include his name on the ballot paper. The judge further held that this was not the function of the court on an application for judicial review, and that the court's remit was to examine the manner in which the challenged decision was arrived at to determine whether the process adopted was fair. Having considered that the specific complaint made by the appellant was that he was not afforded an opportunity to be heard before the Returning Officer determined that his nomination paper was invalid, and the relevant evidence, the judge held that in the circumstances of this case, it was not unfair of the Returning Officer to arrive at her decision without first allowing the claimant to make representations to her as to the meaning of section 51 of the **Constitution**, as the appellant would not be deprived of an opportunity to have his interpretation of section 51 of the **Constitution** tested in the proper forum.

Being dissatisfied with the judgment, the appellant appealed to this Court. By Notice of Appeal filed on 17th October 2024 the appellant lodged six grounds of appeal. However, on 20th October 2024, the appellant filed a Notice of Application in which he sought leave to argue another ground, namely that the Returning Officer acted outside her jurisdiction when she invalidated the appellant's nomination paper pursuant to section 22(1)(d) of the **Elections Act** (the "**Act**") for failure to satisfy the requirements set out in section 51 of the **Constitution**. The appellant invited this Court to treat this as his primary ground of appeal as, if successful, it would be determinative of the appeal.

The issue for resolution on this appeal therefore was whether the Returning Officer exceeded her jurisdiction in purporting to invalidate the appellant's nomination paper on the basis that he had not satisfied the requirements of section 51(3)(c) of the **Constitution**.

Held: declaring that the Returning Officer exceeded her jurisdiction when she invalidated the appellant's nomination paper pursuant to section 22(2)(d) of the Elections Act for failure to satisfy the requirements set out at section 51 of the Constitution by letter dated 11th October 2024 and making no order as to costs, that:

1. The Returning Officer's power to invalidate a candidate's nomination paper and the grounds on which she may do so are expressly set out in section 22(2)(d) of the **Elections Act**. The grounds on which the Returning Officer may do so are limited by the section. The Returning Officer may invalidate the nomination paper on the grounds either that (1) the particulars concerning the candidate or the persons subscribing to the nomination paper are not as required by law; or (2) that the nomination paper is not subscribed as required by law. The phrase "the particulars concerning the candidate... are not as required by law" is a reference to the **Elections Act**, which is the only law governing the form and content of nomination papers.

Section 22 of **The Elections Act**, Chap. 1.04 Revised Edition of the Laws of Montserrat applied.

2. The function that the Returning Officer performs on nomination day is to scrutinise the nomination paper to ensure that it is compliant with the requirements of the **Elections Act**. If it is not, a candidate is disqualified from being nominated. In order to determine whether a nomination paper is valid the Returning Officer is confined to an examination of what appears on the face of the nomination paper.

R v Election Court, Ex P Sheppard [1975] 1 WLR 1319 applied; Section 22 of the **Elections Act** considered; **Sanders and Another v Chichester and Another** [1994] Lexis Citation 2028 considered.

3. It is of course possible to discern on the face of the nomination paper that a candidate is not qualified to stand for election. The Returning Officer can invalidate the candidate's nomination paper because the nomination paper itself alerts her to the fact that it is not subscribed by a duly qualified candidate. However, if, as in the present case, the voters subscribing the nomination paper certify that the candidate is qualified to be elected to the Legislative Assembly, and there is nothing on the face of the nomination paper to contradict this, the Returning Officer cannot go behind this to investigate whether this is so or not.

Greenway-Stanley v Paterson [1977] 2 All ER 663 considered; **Re Melton Mowbray (Egerton Ward) Urban District Council Election** [1968] 3 All ER 761 applied; Section 52 (1) (b) of the **Constitution** of Montserrat, Chap 1.01 Revised Edition of the Laws of Montserrat considered; Section 22 of the **Elections Act** Chap. 1.04 Revised Edition of the Laws of Montserrat applied.

4. There is no rule that immunises from challenge the decision of the Returning Officer about the validity or invalidity of a nomination paper. This was an appropriate case for the appellant to have engaged the judicial review procedure as on the face of it the Returning Officer plainly acted unlawfully.

R (on the application of De Beer and others) v Balabanoff (Returning Officer for London Borough of Harrow) [2002] EWHC 670 (Admin) considered.

REASONS FOR DECISION

- [1] **WARD JA:** On 21st October 2024, after hearing arguments, the Court allowed the appeal and promised to provide written reasons for its decision. These are those reasons.

Background

- [2] The political affairs of Montserrat are administered by a Legislative Assembly comprising nine elected members and two ex officio members, namely the

Attorney General and the Financial Secretary. Members are elected to the Legislative Assembly at a general election. A general election was scheduled to be held in Montserrat on 24th October, 2024. 10th October 2024 was appointed Nomination Day. The appellant duly submitted his nomination papers to the Returning Officer. No objection was made by anyone to his nomination papers and no indication was given to him on that day as to the status of his nomination papers, whether valid or invalid. It was previously agreed between the Electoral Commission and prospective candidates that if objection were taken to any prospective candidate's nomination paper, that candidate would be allowed 48 hours to respond. On 13th October 2024, the appellant received a letter from the Returning Officer, dated 11th October 2024, informing him that his nomination was being rejected because he did not meet the requirements of section 51(3)(c) of the **Constitution**¹. It is important to set out the contents of that letter in full:

"Dear Mr. Kirnon,

Section 22 (d) of the Elections Act states that *"the Returning Officer shall have the right on his own motion to hold a nomination paper invalid on the ground either that the particulars concerning the candidate or the persons subscribing to the nomination are not as required by law, or that the nomination paper is not subscribed as required by law."*

As the Returning Officer for the Montserrat General Election 2024, having examined the particulars of your nomination paper, I am unable to accept it as valid.

After conducting further investigations with the Montserrat Immigration Department, it has been discovered that you have been in Montserrat for ninety-four (94) days over the last five (5) years and not at least (12) months over the past five years immediately preceding the 10th October 2024. This the date your nomination for this elation is being considered as required by law.

This decision is based on section 51(3)(c) of the Constitution of Montserrat 2013.

The necessary arrangements will be made to refund your nomination fee.

Your sincerely, etc."

¹ Chap. 1.01 Revised Edition of the Laws of Montserrat.

The proceedings below

- [3] On 14th October 2024, the appellant launched judicial review proceedings seeking: (a) a declaration that the Returning Officer acted in excess of her jurisdiction and therefore exceeded her powers when she purported to invalidate the appellant's nomination without adherence to any proper procedure and without due process, thereby depriving the appellant of the protection of the law under section 7 of the **Constitution**; (b) a declaration that the decision of the Returning Officer was made in breach of the rules of natural justice; (c) an order of certiorari to quash the decision of the Returning Officer, or an order setting it aside; and damages and costs. The essential ground of the judicial review application was that the decision of the Returning Officer was arrived at in breach of the rules of natural justice insofar as she did not provide the appellant with the opportunity to be heard and in a manner inconsistent with the procedure established by the Elections Commission and/or the Supervisor of Elections whereby candidates were assured that in the event of any objection to their nomination, the candidate would be given 48 hours within which to respond before a decision is made.
- [4] In a judgment dated 15th October 2024 the learned judge dismissed the application. He held that the appellant was asking the court to mandate the Returning Officer to register him as a candidate for the elections and to include his name on the ballot paper. The judge correctly held that that was not the function of the court on an application for judicial review, and that the court's remit was to examine the manner in which the challenged decision was arrived at to determine whether the process adopted was fair. The judge considered that the specific complaint made by the appellant was that he was not afforded an opportunity to be heard before the Returning Officer determined that his nomination paper was invalid. Having examined the evidence, the judge held that in the circumstances of this case, it was not unfair of the Returning Officer to arrive at her decision without first allowing the claimant to make representations to her as to the meaning of section 51 of the **Constitution** as the appellant would not be deprived of an opportunity to have his interpretation of section 51 of the **Constitution** tested in the proper forum.

[5] Being dissatisfied with the judgment, the appellant appealed to this court. By Notice of Appeal filed on 17th October 2024 the appellant lodged six grounds of appeal:

- (i) The learned judge erred and misdirected himself in law and fact when he misconstrued the relief prayed for by the appellant by stating at paragraph 5 of the decision that the appellant “is asking the court to mandate the returning officer to register him as a candidate for elections and to include him on the ballot paper,” and further, “that he wants the court to order that a different decision be made by the returning officer”, when no such relief was requested by the appellant;
- (ii) The learned judge further erred in law and misdirected himself when he wrongly assumed (paragraph 5) that the appellant was asking the court to substitute its decision for that of the returning officer, and therefore went on to render a decision which was premised on a wrong assumption;
- (iii) The learned judge erred in law and misdirected himself not appreciating that the court was only being asked to declare that the decision of the returning officer was procedurally unfair, thereby placing the onus on the returning officer to resort to the procedure which the Elections Commission had established for the said purpose;
- (iv) Having referred to the case of *Rowe et al v the Commissioners for HM Revenue and Customs* [2015] EWHC 2293 (Admin) at paragraph 8 of his decision, as an authority for the proposition that fairness depended on the particular context of each individual case, the learned judge failed to consider, as he should have, that the appellant’s case was easily distinguishable from the facts of that case. In particular, that the case involved issues of taxation, where the procedure for challenging a tax return is after the tax is imposed, as distinct from the appellant’s case in which the

respondent established a clear procedure for providing a response to any objection, before a decision is made;

- (v) The learned judge failed to consider the legal effect of the respondent's failure to follow the procedure which the Elections Commission had established for all candidates and undertaken to follow in the event of an objection to the nomination of any candidate;
- (vi) The learned judge failed to consider whether the respondent was bound by the constitutional requirement set out in section 7(8) of the **Constitution** for an adjudicating body to be fair in the particular circumstances of this matter and whether fairness required that the appellant should have been provided with an opportunity to be heard before a decision was taken in his case.

[6] However, on 20th October 2024, the appellant filed a Notice of Application in which he sought leave to argue another ground namely that the Returning Officer acted outside her jurisdiction when she invalidated the appellant's nomination paper pursuant to section 22(1)(d) of the **Elections Act**² (the "**Act**") for failure to satisfy the requirements set out in section 51 of the **Constitution**.

[7] This was effectively an additional ground of appeal in relation to a point which was not taken before the court below, as the appellant was forced to acknowledge. While it true that the appellant's judicial review application did seek a declaration that the Returning Officer acted in excess of her jurisdiction and therefore exceeded her powers when she purported to invalidate the appellant's nomination, that alleged excess of jurisdiction was premised on her failure to adhere to any proper procedure and without due process before arriving at her decision.

[8] However, the appellant submitted that, if allowed, this ground would be determinative of the appeal. He therefore invited the Court to exercise its

² Chap 1.04 Revised Edition of the Laws of Montserrat.

discretion to entertain this ground of appeal pursuant to section 33 (2) of the **Supreme Court Act**³, which provides that the powers of the Court of Appeal under this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings in court or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such notice; and the Court of Appeal may make any order in such terms as the Court of Appeal thinks just to ensure the determination on the merits of the real question in controversy between the parties.

- [9] This Court took the view that while this point was not raised as a ground of appeal, it was germane to the real issue in controversy between the parties. The Court considered that since the point went to the very jurisdiction of the Returning Officer to invalidate the appellant's nomination papers on the grounds on which she purported, it was just and fair that the appellant be permitted to pursue it.

The appellant's submissions

- [10] The appellant submitted that the power conferred by section 22(2)(d) of the **Elections Act** is a power to hold the appellant's nomination paper invalid on the grounds either that the particulars concerning the candidate or the persons subscribing to the nomination are not as prescribed by law or that the nomination paper is not subscribed as required by law. Based on the prescribed nomination form set out in Form 4 of the Schedule to the **Elections Act**, the particulars required are the surname, other names, address and occupation of the candidate and nominating witnesses.
- [11] The appellant further submitted that the Returning Officer derives her powers from the **Elections Act** and nothing in that Act enlarges her powers beyond that set out in section 22(2)(d). More particularly, nothing in section 22 confers power on the Returning Officer to invalidate a nomination paper on the basis of a constitutional requirement, or to otherwise enforce any provision of the **Constitution**. By importing constitutional requirements "into the nomination

³ Chap. 2.01 Revised Edition of the Laws of Montserrat.

paper” the Returning Officer usurped the powers of the High Court under section 59 of the **Elections Act** and took on a role for which she lacked the requisite legal competence.

- [12] It was further submitted that, in any event, the jurisdiction of the Returning Officer to invalidate his nomination paper expired on nomination day so that when she purported to invalidate it on a subsequent date, that act was of no effect.

The respondents’ submissions

- [13] For the respondents, Ms. Morgan submitted that section 21 of the **Act** sets out what happens on nomination day. Section 21(1) provides that the returning officer must attend at certain hours and receive the nomination of any duly qualified candidate for the seat to be filled. Nowhere in the **Act** says who is a duly qualified candidate. The law which sets this out is found in section 51 of the **Constitution of Montserrat**. The fact that the Returning Officer is required to distinguish between who is qualified and who is not, refers her immediately to section 51 of the **Constitution**. If the Returning Officer already has information at her disposal, she can consider whether a candidate is qualified under section 51 of the **Constitution**. Ms. Morgan seeks to buttress this argument by reference to the nomination form itself, which requires the voters subscribing to the nomination paper to certify that the candidate is qualified to stand for election.

- [14] Ms. Morgan further submitted that the language of section 22(d) encompasses the qualification of a candidate because the Returning Officer on her own motion can declare a nomination paper invalid on the grounds either that the particulars concerning the candidate or the person subscribing to the nomination are not as required by law or that the nomination paper is not subscribed as required by law. The words “as required by law” are the controlling words and are not confined to the Act.

- [15] Further, submitted Ms. Morgan, section 22 provides that the nomination paper can be invalidated if the “particulars concerning the candidate are not as required by law.” These particulars do not refer to matters such as name and address. Those particulars are not set out in the **Elections Act** so it is to section 51 of the

Constitution that one must look to discover what the particulars of the candidate are that are referred to in section 22, otherwise there would be no point to section 22 (1) which requires the Returning Officer to receive the “nomination paper of a duly qualified candidate”. Ms. Morgan submitted that those words must mean something. To divine their proper meaning section 22(2)(d) has to be read in the context of 22(1). When regard is had to section 51 of the **Constitution** the reference in section 22(2)(d) to “the particulars concerning the candidate” is a reference to those matters set out in section 51 of the **Constitution**.

[16] Ms. Morgan further submitted that where the Returning Officer is already in possession of information that a person is clearly disqualified that is a basis on which she can hold the nomination invalid because in such an instance the particulars are not as required by law. The Returning Officer is not obliged to accept the nomination papers of a person whom she knows to be disqualified under the **Constitution**.

[17] In response to the appellant’s submissions that the Returning Officer lacked jurisdiction to invalidate his nomination paper after nomination day, Ms. Morgan submitted that the **Elections Act** is silent on this so it cannot be said that jurisdiction has expired once nomination day has passed. The Elections Commission can regulate its own procedure per section 78(5) of the **Constitution**.

[18] Ms. Morgan’s concluding submission was that, in any event, whether the Returning Officer exceeded her jurisdiction should properly be raised by the appellant on an election petition and not by way of judicial review. She submitted that someone who argues that they should have been returned can raise this on an election petition.

The statutory regime

[19] Elections in Montserrat are governed by the **Elections Act**. Part 3 of the **Act** contains provisions governing the arrangements for elections. Part 4 deals with election petitions.

- [20] The responsibility for supervising elections in Montserrat is vested in the Electoral Commission, established under section 78 of the **Constitution**, pursuant to section 4 of the **Act**. The Commission's Chairman performs the duties of Supervisor of Elections. In turn, the Governor, on the recommendation of the Supervisor of Elections, may appoint a fit and proper person to be the Returning Officer pursuant to section 9 of the **Act**.
- [21] The process for making arrangements for holding a general election in Montserrat commences when the Governor issues a writ in the prescribed form under the Public Seal to the Returning Officer. That writ specifies the day and place of nomination of candidates, the day on which, if necessary, the poll shall be taken, being not less than seven days after the day of such nomination, and the day on which such writ shall be returnable to the Governor. Upon receipt of the writ, the Returning Officer is required to proceed to hold the election in accordance with the procedure provided in Part 3 of the **Act**.
- [22] The first step the Returning Officer must take is to publish in the Gazette and one or more newspapers published in Montserrat, a notice in the prescribed form, of the day and place fixed for the nomination of candidates. That notice must be given seven clear days before nomination day. Section 21(3) of the **Act** provides:
- “Nomination papers shall be provided by the returning officer and shall be in the form set out as Form No. 4 in the schedule.”
- [23] The particulars required to be supplied on that form are:
- (i) The signatures of two voters who must (a) nominate a candidate, (b) certify that to the best of their belief he is qualified for election as a member of the Legislative Assembly;
 - (ii) The surname, other names, address and occupation of the nominated candidate;
 - (iii) The signed consent of the nominated candidate;
 - (iv) The signature of a witness to the candidate's consent
- [24] Section 22 is very important to the resolution of the issues on this appeal as it governs the nomination of candidates. It is set out in full.

“Nomination of candidates

22. (1) On the day and at the place so fixed for the nomination of candidates the returning officer shall attend between the hours of 10 a.m. and 1 p.m. and between the hours of 2 p.m. and 4 p.m. and receive the nomination of any duly qualified candidate for the seat to be filled.

(2) (a) Each candidate for election shall be nominated on a nomination paper by at least two registered voters, and his consent to nomination shall be given in writing on his nomination paper and attested by one witness:

Provided that, no candidate shall be deemed not to have been validly nominated by reason only of the fact that subsequent to nomination day any person by whom his nomination paper was signed is struck off the preliminary list of voters or the Register of Voters, or has died.

(b) No person shall propose, second or assent to the nomination of more than one candidate on the same nomination day.

(c) Only the candidates, their election agents, and the persons by whom the candidates' nomination papers are signed shall have the right to be present at the nomination proceedings before the returning officer.

(d) Any person entitled to be present at nomination proceedings may challenge the validity of any other candidate's nomination paper. In addition thereto the returning officer shall have the right on his own motion to hold a nomination paper invalid on the ground either that the particulars concerning the candidate or the persons subscribing to the nomination are not as required by law, or that the nomination paper is not subscribed as required by law.” (emphasis added)

[25] The eligibility criteria for election to the Legislative Assembly are set out at section 51 of the **Constitution of Montserrat**, which provides:

“51. (1) Subject to section 52, only a person described in subsection (2) is qualified to be elected as an elected member of the Legislative Assembly providing the requirements of subsection (3) are satisfied.

(2) The person referred to in subsection (1) is a person—

(a) who is a Montserratian by virtue of section 107(2)(a) or 107(2)(b)(ii); and

(b) who was born of a father or mother who at the time of the birth was a Montserratian by virtue of section 107(2)(a) or 107(2)(b)(ii).

(3) The requirements referred to in subsection (1) are that the person must—

(a) have attained the age of 21 years;

(b) be a registered voter; and

(c) have been in Montserrat for at least twelve months during the five years immediately preceding the date of his or her nomination for election.”

- [26] The grounds on which a person is disqualified from being eligible for election are set out in section 52 of the **Constitution** but are not in play in the present appeal.
- [27] Section 55 (a) of the **Constitution** provides that any question about whether any person has been validly elected as a member of the Legislative Assembly shall be referred to and determined by the High Court in accordance with any law in force in Montserrat, and subject to any such law, in accordance with any directions given by the Chief Justice.
- [28] The relevant law governing the procedure for determining whether any person has been validly elected as a member of the Legislative Assembly is section 59 of the **Elections Act**. Section 59 provides for the presentation of an election petition to the High Court complaining of an undue return or undue election of a member of the Assembly. Such a petition may be presented by: (a) a voter or person who had the right to vote at the election; (b) a person claiming to have had a right to be returned at such election; or (c) some person alleging himself to have been a candidate at such election.
- [29] An election may also be avoided if, on the trial of an election petition the judge certifies that the candidate has been personally guilty or guilty by his agents of any corrupt or illegal practice or for general corruption.⁴

Discussion and analysis

- [30] The basis on which the Returning Officer purported to invalidate the appellant's nomination paper was that he did not satisfy the requirements of section 51(3)(c) of the **Constitution**. This provision requires the appellant to have been in Montserrat for at least twelve months during the five years immediately preceding the date of his nomination for election.
- [31] The issue for resolution on this appeal is whether the Returning Officer exceeded her jurisdiction in purporting to invalidate the appellant's nomination paper on the

⁴ See sections 61 and 62 respectively of the Act.

basis that he had not satisfied the requirements of section 51(3)(c) of the **Constitution**.

[32] Ms. Morgan seeks to justify the action of the Returning Officer by arguing that the operative words of section 22 are to be found in subsection (1) which mandates the Returning Officer to “receive the nomination of any duly qualified candidate...” (her emphasis). It was argued that since the Act does not state who is a duly qualified candidate, the Returning Officer was obliged to resort to section 51 of the **Constitution** which sets out the qualification criteria for candidates, in order to distinguish between who is qualified and who is not. Ms. Morgan attempts to surmount the challenge presented by section 22(d), which is the subsection setting out the specific grounds on which the Returning Officer may invalidate a nomination paper, by arguing that the phrase “the particulars concerning the candidate...are not as required by law” there referred to is a reference to section 51 of the **Constitution**.

[33] For the reasons that follow, the Court does not agree with either submission.

[34] The Returning Officer’s power to invalidate a candidate’s nomination paper and the grounds on which she may do so are expressly set out in section 22(2)(d) of the **Act**. Under this subsection, a candidate’s nomination paper may be challenged by any person entitled to be present at nomination proceedings. These persons are identified at section 22(2)(c) but nothing turns on this for present purposes as this was a case where the Returning Officer acted on her own motion to hold a nomination paper invalid pursuant to section 22(2)(d) of the **Act**. The grounds on which the Returning Officer may do so are limited by the section. The Returning Officer may invalidate the nomination paper on the grounds either that (1) the particulars concerning the candidate or the persons subscribing to the nomination paper are not as required by law; or (2) that the nomination paper is not subscribed as required by law. The phrase “the particulars concerning the candidate... are not as required by law” is a reference to the **Elections Act**, which is the only law governing the form and content of nomination papers.

[35] It is important to have in mind the function that the Returning Officer performs on nomination day. It is to scrutinise the nomination paper to ensure that it is compliant with the requirements of the **Election Act**. If it is not, a candidate is disqualified from being nominated. This must be discerned from what appears on the face of the papers. There is ample persuasive authority for the proposition that in determining whether a nomination paper is valid or invalid, the Returning Officer is confined to scrutinising what appears on the face of the nomination paper to see that it is compliant in form only.

[36] In **R v Election Court, Ex P Sheppard**⁵, an unsuccessful candidate challenged the election of the successful candidate by way of election petition on the basis that the Returning Officer had wrongly held the returned candidate's nomination paper to be valid. It was contended that it was invalid because it falsely described an address as his home address in breach of rule 5 of the Local Elections (Principal Areas) Rules 1973.

[37] Rule 5 provided:

“(1) Each candidate shall be nominated by a separate nomination paper in the form in the Appendix, or a form to the like effect, delivered at the place fixed for the purpose by the returning officer, which shall be at the offices of the council of the district or London borough in which the electoral area wholly or mainly lies. (2) the nomination paper shall state the full names, home address and (if desired) description of the candidate and the surname shall be placed first in the list of his names.”

[38] The Commissioner hearing the petition agreed and declared that the candidate was not duly elected. The Commissioner having refused to state a case, the applicant (the successful candidate) sought an order of mandamus compelling the Commissioner to state a case or alternatively an order of certiorari to quash the decision on the ground that the Commissioner erred in law in that the Returning Officer's decision as to the validity of the nomination paper was final and unquestionable in any proceeding, pursuant to rule 8 (6). Rule 8 provided, so far as relevant:

“(1) Where a nomination paper and the candidate's consent thereto are delivered in accordance with these rules the candidate shall be deemed

⁵ [1975] 1 WLR 1319.

to stand nominated unless and until the returning officer decides that the nomination paper is invalid, or proof is given to the satisfaction of the returning officer of the candidate's death, or the candidate withdraws.

(2) The returning officer shall be entitled to hold a nomination paper invalid only on one of the following grounds, that is to say:- (a) that the particulars of the candidate or the persons subscribing the paper are not as required by law; or (b) that the paper is not subscribed as so required."

(3) The returning officers shall examine the nomination papers and decide whether the candidates have been validly nominated in accordance with these rules and shall; do so as soon as practicable after each paper is delivered...

(6) The decision of the returning officer that a nomination paper is valid shall be final and shall not be questioned in any proceeding.

(7) Subject to the last foregoing paragraph, nothing in this rule shall prevent the validity of a nomination being questioned on an election petition."

- [39] In refusing the application, the court held that the duties of a Returning Officer examining a nomination paper for validity under rule 8(2) did not go beyond ascertaining whether the paper was correct in form on its face. Lord Widgery elaborated the proposition as follows:

"I take the view that the provisions of subrule (2) that the returning officer can hold a nomination paper invalid only on the ground there specified, means that it is only to those grounds that the returning officer applies his mind when deciding whether to rule a nomination paper valid or not. Furthermore, as it seems to me he must be looking to see if the paper is good in form. The returning officer cannot possibly be expected to know where every candidate lives and where everybody who has supported the candidate is to be found. Those are matters which are not for him to certify one way or the other. But what the returning officer must do in my judgment is to see that the form of the document is correct and that, where a home address is required, then there is an address purporting to be the home address of the person concerned. I do not think the returning officer's duties, or the consequence of his performance of these duties, goes beyond seeing that the form is correct on its face."

- [40] The application was ultimately dismissed because while the court held the validity of the nomination paper could not be challenged as to form because the defect complained of - the falsity of the address - was not apparent on the face of the nomination paper, the nomination itself could be challenged on substantive grounds by way of a petition pursuant to subrule (7). There, the substantive complaint was that the address stated on the nomination paper was false and this was proved to be so at the hearing of the petition.

- [41] There are some obvious differences between rule 8, at which we have been looking, and Section 22 of the **Elections Act**. The **Elections Act** does not contain an express provision to the effect that once a candidate delivers a nomination paper in the prescribed form the candidate shall be deemed to stand nominated unless and until the Returning Officer decides that the nomination paper is invalid. But this outcome would seem to follow by necessary implication if the Returning Officer does not at any stage declare the nomination paper invalid. Similarly, while the **Act** does not specifically say that the Returning Officer must render a decision on the status of the nomination paper “as soon as practicable after each paper is delivered” there is no reason to suppose that there is not a similar expectation under the **Act**. Indeed, the Returning Officer here rendered her decision on the appellant’s nomination paper the next day, although it was actually delivered to him two days later.
- [42] Another difference is that the **Act** does not immunise the Returning Officer’s decision with respect to the validity of a nomination paper from challenge.
- [43] Apart from these differences, the important similarity between these rules and the **Act** is that both section 22 (2)(d) of the **Act** and rule 8(2) prescribe the same grounds on which a Returning Officer may invalidate a nomination paper. For this reason, the dicta of Lord Widgery in relation to the scope of the Returning Officer’s power to invalidate a nomination paper is relevant, persuasive and consistent with a proper interpretation of section 22 of the **Act** as discussed above.
- [44] A similar conclusion was reached in **Sanders and Another v Chichester and Another**.⁶ In this case the court had to decide certain preliminary questions on an election petition arising out of the European Parliamentary Election for the Devon and East Plymouth Constituency. So far as relevant to this appeal, one of the preliminary questions to be determined was whether the particulars of the candidate, Richard John Huggett were “not as required by law” within the meaning of Rule 12(2)(a) of the Parliamentary Election Rules (“the Rules”) in Schedule 1 of the Representation of the Peoples Act 1983, on the basis that his description

⁶ [1994] Lexis Citation 2028.

of himself as "Liberal Democrat" did not satisfy the requirements of r 6(3) of the Rules, namely that this description, together with his other particulars on the nomination paper, should be sufficient to identify him.

- [45] The Parliamentary Election Rules in Sch 1 of the 1983 Act as applied by the European Parliamentary Elections Regulations 1986 (as amended) contain the following rules, so far as relevant:

“Nomination of Candidates

6.(1) Each candidate shall be nominated by a separate nomination paper in the form in the Appendix delivered -

- (a) by the candidate himself, or
- (b) by his proposer or seconder, to the returning officer at the place fixed for the purpose, but the paper may be so delivered on the candidate's behalf by his election agent if the agent's name and address have been previously given to the returning officer as required by s 67 of this Act or are so given at the time the paper is delivered.

(2) The nomination paper shall state the candidate's -

- (a) full names
- (b) home address in full, and
- (c) if desired, description.

and the surname shall be placed first in the list of his names.

(3) The description, if any, shall not exceed 6 words in length, and need not refer to his rank, profession or calling so long as, with the candidate's other particulars, it is sufficient to identify him.

(4) A nomination paper may consist of a single sheet, or of two or more sheets securely fastened together.

Subscription of nomination paper

7.(1) The nomination paper shall be subscribed by two electors as proposer and seconder, and by 28 other electors assenting to the nomination.

Consent to nomination

8.(1) A person shall not be validly nominated unless his consent to nomination -

- (a) is given in writing on or within one month before the day fixed as the last day for the delivery of the nomination papers,
- (b) is attested by one witness, and
- (c) is delivered at the place and within the time for delivery of nomination papers...”

- [46] Rule 12 deals with decisions as to the validity of nomination papers. Rule 12(2)(a) provided:

“(2) The returning officer is entitled to hold a nomination paper invalid only on one of the following grounds -

(a) that the particulars of the candidate or the persons subscribing the paper are not as required by law;
 (b) that the paper is not subscribed as so required; and
 (c) that the candidate is disqualified by the Representation of the People Act 1981 (which applies in respect of the office of representative to the European Parliament by virtue of para 5(1)(a) of Sch 1 to the Act of 1978).”

[47] It is apparent that the grounds for holding a nomination paper invalid under rule 12(2)(a) and (b) are in substance the same as the grounds in section 22(2)(d) of the **Elections Act**. By contrast, whereas rule 12(2)(c) provides an additional ground on which the Returning Officer may hold a nomination paper invalid, namely, that the candidate is disqualified by the Representation of the People Act 1981, there is no such provision in the **Act**.

[48] In construing rule 12(2)(a) the court held:

“In our judgment, upon the true construction of r 12(2)(a) the returning officer is not entitled, when considering whether to hold a nomination paper invalid, to investigate the facts underlying the name, address or description of the candidate. The decision has to be taken by simply looking at the nomination paper of the candidate in question alone. The language of the Rules is drafted to distinguish between the nomination paper of a candidate and his nomination. Thus, for example, rr 8(1), 9(1) and 12(6) speak of "nomination"; whereas r 11(1)(3), 12(1)(a),(2)(3)(4) and (5) are concerned with a "nomination paper". The power under r 12(2)(a) is concerned with nomination papers.

The Courts have on a number of occasions stated that the duty of the returning officer under the predecessor rules of r 12(2) of the Rules did not require him to conduct any investigation of the underlying facts, but merely to look at and not beyond the face of the nomination paper itself. We have been referred to *Pritchard v Bangor Corporation* 1888, 13 App Cas 241, *Watson v Ayton* [1946] 1 KB 297, *R v Election Court, ex parte Sheppard* [1975] 2 All ER 723, [1975] 1 WLR 1319 and *Greenway-Stanley v Patterson* [1977] 2 All ER 663, 75 LGR 367.”

[49] In my view, this case provides further persuasive support for the view that in order to determine whether a nomination paper is valid the Returning Officer is confined to an examination of what appears on the face of the nomination paper.

[50] Ms. Morgan submitted that where a Returning Officer on nomination day is in possession of information that a candidate is not qualified to be elected, that is a basis on which she can declare his nomination papers invalid. It is of course

possible to discern on the face of the nomination paper that a candidate is not qualified to stand for election. For example, if he describes his occupation as a public officer or magistrate, then it would be immediately apparent on the face of the nomination paper that he is disqualified by virtue of section 52(1)(b) of the **Constitution** which disqualifies such persons from standing for election. In such a case the nomination paper itself discloses that one of the particulars concerning the candidate (his occupation) demonstrates that he is not a duly qualified candidate as required by section 22(1). The Returning Officer can invalidate the candidate's nomination paper because the nomination paper itself alerts her to the fact that it is not subscribed by a duly qualified candidate.

- [51] However, if, as in the present case, the voters subscribing the nomination paper certify that the candidate is qualified to be elected to the Legislative Assembly, and there is nothing on the face of the nomination paper to contradict this, the Returning Officer cannot go behind this to investigate whether this is so or not. It is very clear that this is exactly what she did in this case as reflected in her letter communicating her decision to the appellant. She informed him that:

“After conducting further investigations with the Montserrat Immigration Department, it has been discovered that you have been in Montserrat for ninety-four (94) days over the last five (5) years and not at least (12) months over the past five years immediately preceding the 10th October 2024.”

- [52] In my view, a broad and unqualified statement that where a Returning Officer on nomination day is in possession of information that a particular candidate is not qualified to be elected (which does not appear to be the case as reflected in this letter) she can declare his nomination papers invalid does not provide a principled answer to the important issue raised on this appeal in a way that will provide clear guidance to a Returning Officer going forward. It still leaves open the question of how the Returning Officer would determine whether each of the other candidates (about whom she has no information) meets the requirements of section 51 which, according to the respondent, is the duty imposed on her by section 21(1) of the Act. Ms. Morgan was unable to point to any enabling mechanism within the Act to facilitate such a roving inquiry.

[53] Furthermore, that very argument was deployed in **Greenway-Stanley v Paterson**⁷ and firmly rejected. In that case. The argument, and the court's treatment of it, are captured in the following passage in the judgment of O'Connor, J:

"It is submitted by counsel for the returning officer that all that the court was doing in that case [Ex P Sheppard] was saying that there was no duty on the returning officer to do more than scrutinize the actual nomination papers but that if information came to his notice which showed that the candidate was disqualified, and patently disqualified, he would be entitled to reject the nomination paper. I do not agree with that submission. It seems to be that the returning officer's duty is confined to seeing that the nomination papers are in due form. Obviously that must include, if he so wishes, a check against the electoral roll because, for example, the subscribers have to give their electoral roll numbers, and it would be perfectly proper for the returning officer to look at the electoral roll and if he finds a discrepancy to take action on it, and if it is not put right the paper on the face of it is invalid and it can be so declared; but it does not entitle him to embark on an enquiry as to the validity of the candidate's particulars which, on their face are unobjectionable. There is good sense, in my judgment for so holding because the time limits are necessarily fairly tight and there is no time or machinery to make the sort of enquiry which it is necessary to make in order to reach a decision by the closing date for nominations...Also there is no machinery by which the returning officer could embark on such a [sic] enquiry. In my judgment not only is he under no duty to do so but the duty is that he should not do so and that he cannot embark on that sort of enquiry."

[54] In his judgment, Wien, J expressly disavowed the statement by Paull, J in **Re Melton Mowbray (Egerton Ward) Urban District Council Election**⁸ that "there is no authority to suggest that he [the returning officer] merely has to look at the form with which he is presented. He has the opportunity to make such enquiries as he may think right." Wein, J opined⁹:

"I doubt whether the returning officer should ever make enquiries such as suggested by Paull, J. Once he starts making any enquiries, whether as the result of an anonymous letter or because of something which does not arise on the form of the nomination paper, then he is almost bound to put himself in a situation for which the rules do not cater. Once he embarks on enquiries he would have to come to some determination in a very limited time. His enquiries might not be complete. But he could not extend the time limit. That cannot be satisfactory or desirable."

⁷ [1977] 2 All ER 663.

⁸ [1968] 3 All ER 761 at 763.

⁹ At p. 671, f-h.

I will content myself by stating if he has any such right to investigate then it must be solely because the nomination paper on its face puts him on enquiry.”

- [55] I respectfully agree with the proposition established by this case, as developed further below.
- [56] It seems that the source of confusion feeding the contention advanced by the respondent is section 22(1) of the Act, which requires the Returning Officer to “receive the nomination of any duly qualified candidate”. Ms. Morgan relies heavily on this provision and lays emphasis on the words “duly qualified.” She submitted that for this provision to make sense, where 22(2)(d) provides that “the particulars concerning the candidate...are not as required by law,” these words must be read as referring to the qualification criteria under section 51 of the **Constitution**. There are difficulties with this submission as a matter of statutory construction and from a practical point of view.
- [57] In its ordinary sense, the word “particulars” connotes specific details. In the context in which the expression “particulars concerning the candidate” is used in section 22, it connotes the specific details required to be included on the nomination paper as prescribed therein pursuant to the **Elections Act**. These particulars would be the surname, other names, address, occupation of the candidate, and his signed consent, to which a witness has affixed their signature. It would be straining language to try to fit the eligibility criteria listed in section 51 of the **Constitution** in the mould of particulars concerning the candidate required by law within the meaning of section 22(2)(d) of the Act.
- [58] The respondent’s concern that the Returning Officer must be satisfied that the candidate is duly qualified, is met by the requirement imposed by the **Act**, through the prescribed form, that the persons subscribing the candidate’s nomination must certify that the candidate is qualified for election. The certificate reads in full:
- “We, the undersigned voters...do hereby nominate the following person as a proper person to serve as a member of the Legislative Assembly of Montserrat and we certify that to the best of our belief he is qualified for election as a member of the Legislative Assembly.”

- [59] Apart from this, the Act does not impose any other requirement on the candidate or anyone else to prove by any other means that the candidate is qualified to stand for election. The Act contemplates that the Returning Officer will act on the face of this certificate and treat the candidate as duly qualified. If the nomination paper does not contain such a certificate by each subscribing voter, then it can be said that the nomination paper is not subscribed as required by law.
- [60] Further, if the Returning Officer were required by the **Elections Act** to go behind the certificate on the nomination paper attesting to the candidate's eligibility to stand for election, one would expect there to be some stated mechanism for her to go about that task, which she would have to perform in relation to each candidate if she is to faithfully discharge her duty to ensure that each candidate is duly qualified under the **Constitution**.
- [61] From a practical point of view, the respondent's interpretation, if correct, would place an onerous duty on the Returning Officer to ascertain on nomination day, or within a tight time frame thereafter, that each candidate who presents a nomination paper is duly qualified under section 51 and or not disqualified under section 52. The sort of information and enquiry, not to mention factual and legal contentions that may arise in determining this issue, simply are not matters which the Returning Officer is equipped to undertake, nor required to by the **Act**. The procedure for determining whether a person is qualified to be elected is governed by section 59 of the **Act** and is by way of petition. The Regulations contain detailed provisions for the presentation of a petition. The extensive experience of the courts in this region in conducting election petitions will attest to the many factual and legal intricacies that can emerge in the quest to ascertain whether a candidate was qualified or not to stand for an election.
- [62] The interpretation of section 22(2)(d) of the **Act** posited by the respondent would transform the role of the Returning Officer from one which requires her to determine solely whether the nomination paper is valid, to one where she determines whether the candidate is qualified to be elected. This is not her remit since questions as to the qualification or disqualification of a candidate are

determined exclusively by way of an election petition in the High Court after elections and not by the Returning Officer on nomination day.

[63] In my view, therefore, the phrase "the particulars concerning the candidate are not as required by law" refers to the particulars required to be supplied on the prescribed nomination paper in accordance with section 22(2) of the **Elections Act** which, is the sole piece of legislation governing the form and content of nomination papers. If this phrase were intended to refer to the qualification criteria under section 51 of the **Constitution** the legislature could have quite simply stated that a ground for invalidating the nomination paper is that the candidate lacked the qualifications set out in section 51 of the **Constitution**.

[64] I would add that there are further indicators within the **Act** that it is to section 22(2) alone that one must look to determine whether a candidate has been validly nominated. For example, section 24, which deals with the withdrawal of candidature, contains a proviso that "no fresh nomination shall be necessary in the case of any candidate who has been validly nominated in accordance with section 22(2). It seems clear, therefore, that this is the operative section governing the validity of a nomination paper.

[65] For completeness, I must address one further submission advanced by Ms. Morgan. It was submitted that it was not open to the appellant to have challenged the Returning Officer's decision to invalidate his nomination paper by way of judicial review. His challenge, it is said, should have been brought by way of an election petition after the General Election. The respondent took this point in the court below, arguing in written submissions that "the overriding objective of ensuring that there is clarity in the electoral process and progressive movement from Nomination Day to Election Day, is sufficient, and that no judicial review application based on proceedings at Nomination Day should be entertained." The submission was implicitly rejected because the judge proceeded with the judicial review proceedings but ultimately dismissed it. The respondent has not cross-appealed. Nonetheless, the point can be shortly addressed.

[66] In **R (on the application of De Beer and others) v Balabanoff (Returning Officer for London Borough of Harrow)**¹⁰ the court considered whether it had the power to interfere by way of judicial review with a decision of a Returning Officer who had invalidated the nomination papers of a number of candidates of the Liberal Democrats Party. This was in the face of rule 7(6) of the Local Elections (Principal Areas) Rules 1986, which provided:

“The returning officer's decision that a nomination paper is valid shall be final and shall not be questioned in any proceeding whatsoever.”

[67] The Court answered the question in the following way:

“[36] The wording of that rule seems to me to leave open the converse situation where the returning officer has decided that a nomination paper for one reason or another is invalid.

[37] It has not been argued before me that the court cannot interfere by way of judicial review, although it is fair to say that neither party was aware of any case where there has been a successful application for judicial review against a returning officer.

[38] In my judgment, although judicial review does lie, this is an area in which the courts should be extremely slow to interfere with the decision of a returning officer. No doubt where a returning officer has plainly acted unlawfully relief will lie. But ordinarily returning officers should be left to conduct the election process as provided by Parliament.”

[68] In my view, the same reasoning applies with even greater force in the Montserrat context, where there is no rule that immunises from challenge the decision of the Returning Officer about the validity or invalidity of a nomination paper. While as a general proposition Ms. Morgan's submission that it was open to the appellant, and more desirable, to have availed himself of the election petition option is correct, in my opinion, this was an appropriate case for the appellant to have engaged the judicial review procedure as on the face of it the Returning Officer plainly acted unlawfully. The claim was brought when there were still 10 days remaining before the election was due. This was sufficient time to enable steps to be taken to rectify any errors and avert the need for fresh elections, with its attendant financial costs, in the event that the appellant subsequently filed a petition and succeeded.

¹⁰ [2002] EWHC 670 (Admin).

Conclusion

- [69] For all the foregoing reasons the Court concludes that the Returning Officer exceeded her jurisdiction when she purported to invalidate the appellant's nomination paper pursuant to section 22(2)(d) of the **Elections Act** for failure to satisfy the requirements set out at section 51(3)(c) of the **Constitution**.
- [70] There shall be no order as to costs.

I concur.
Hon. Eddy D. Ventose
Justice of Appeal

I concur.
Hon. Gerard St. C Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar